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No. 544

# In the Supreme Court of the United States

OCTOBER TERM, 1955

A. J. JACKSON, as Trustee in Bankruptcy of DALE R. PETERSON & CO., INC., *Petitioner,*

v.

E. FERMIN FLOHR, EDWARD E. FLOHR and L. CARLOS FLOHR, d/b/a FLOHR & CO., METAL FABRICATORS, *Respondents and Cross-Petitioners.*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND CONDITIONAL CROSS-PETITION FOR CERTIORARI

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No.....

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, E. Fermin Flohr, Edward E. Flohr and L. Carlos Flohr, doing business as Flohr & Co., Metal Fabricators, submit this Brief in Opposition to the Petition for Writ of Certiorari filed in this cause by A. J. Jackson, as Trustee in Bankruptcy of Dale R. Peterson & Co., Inc. It is the contention of respondents that (1) the only question involved in this case is one purely of state law, to-wit: the preference law of the State of Washington, and (2) the grounds upon which the petition is based do not satisfy in any respect either the spirit or the specific requirements of Rule 19 of the Revised Rules of the Supreme Court of the United States adopted April 12, 1954, and effective July 1, 1954 (hereinafter referred to as the "Supreme Court Rules").

The decision of the United States District Court, Western District of Washington, Northern Division, in this cause has been reported. *Jackson v. Flohr,* 119 F.Supp. 305 (1954). The decision of the United States Circuit Court of Appeals for the Ninth Circuit (hereinafter referred to as "the Court of Appeals"), in this cause, has, at this writing, not been reported. The full contents of the decision are set forth in petitioner's brief (Appendix A).

## I.

### The Sole Question Involved Is One of State Law

As clearly demonstrated by the pleadings and the decisions of the lower federal courts in this case, the only question raised is an interpretation of the Washington State preference law, R.C.W. (Revised Code of Washington) Chapter 23.48. This case is now in the federal courts because petitioner himself sought to recover a preference under a state-created cause of action under Section 70 of the Bankruptcy Act (11 U.S.C. §110) instead of seeking to recover a preference under the federal-created cause of action under Section 60 of the Bankruptcy Act (11 U.S.C. §96).

## II.

### No Review of a State Court Decision Is Sought

Rule 19 (1)(a) of the Supreme Court Rules states that a review on Writ of Certiorari will be considered:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided in a way probably not in accord with applicable decisions of this court."

It is perfectly clear that the final decisions which are sought to be reviewed in this cause have been made by federal courts. No review of a state court decision is sought by petitioner and therefore Rule 19 (1)(a) is inapplicable.

## III.

### No Conflict With Decisions of Another Court of Appeals on the Same Matter

Rule 19 (1)(b) of the Supreme Court Rules states that a review on Writ of Certiorari will be considered:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter * * * "

In order to bring his case within the ambit of Rule 19 (1)(b), petitioner has sought to show a conflict between the instant decision and a decision rendered over fifty years ago in a case from the Circuit Court of Appeals for the Eighth Circuit. *Swarts v. Fourth National Bank of St. Louis,* 117 Fed. 1 (1902). Petitioner has not attempted in his brief to set forth in what manner the alleged conflict exists with the *Swarts* case. A reading of the case demonstrates clearly that it is completely inapposite and in no respect does it represent a conflict with the instant decision. The *Swarts* case did not involve a state materialman's lien law, a state preference law, nor any state-created cause of action under Secton 70 of the Bankruptcy Act. That case deals with Section 60 of the act, relating to preferences granted not by state law but by federal law, to-wit: the Bankruptcy Act.

## IV.

### No Conflict With Washington State Law

Rule 19 (1)(b) of the Supreme Court Rules states that a review on Writ of Certiorari will be considered where a court of appeals:

> "Has decided an important state or territorial question in a way in conflict with applicable state or territorial law; * * * "

Both petitioner and respondents relied upon the same case—*Seattle Association of Credit Men v. Olaf B. Daniels,* 15 Wn.(2d) 393, 130 P.(2d) 892 (1942)—as being the principal Washington case supporting their respective positions. The District Court and the Court of Appeals, in each instance, held that the *Daniels* case supported the position taken by respondents and represented the state law of Washington. The effect of the *Daniels* case brings about a fair and equitable operation of the preference law of the State of Washington and it represents the present Washington law on the subject of preferences where payment is made by an insolvent to discharge a materialman's lien.

## V.

### No Conflict With Previous Decisions of the Ninth Circuit Court of Appeals

Petitioner in seeking a Writ of Certitorari further contends that the instant decision is in conflict with another decision of the same circuit, to-wit: *San Mateo Feed & Fuel Co. v. Hayward,* 149 F.(2d) 875 (9th Cir. 1945). Both the District Court and the Court of Appeals specifically considered the *San Mateo* case and

rejected this contention. Both courts point out that the decision in the *San Mateo* case was based upon the California State lien law which is different from the Washington State lien law. There can be no conflict because the decisions were based upon different state laws.

## CONDITIONAL CROSS-PETITION FOR CERTIORARI

Cross-petitioners, E. Fermin Flohr, Edward E. Flohr and L. Carlos Flohr, doing business as Flohr & Co., Metal Fabricators, pray that a writ of certiorari issue to review the judgment of the Court of Appeals entered June 23, 1955, the writ to issue only in the event this Court should grant the petition for a writ of certiorari.

### I.

### Jurisdiction

Cross-petitioners adopt petitioner's statement as to the jurisdiction of this Court.

### II.

### Question Presented

Petitioner was at no time vested with a cause of action upon which suit could be brought against cross-petitioners to recover preference payments. Petitioner specifically denies he brought suit upon a cause of action granted by federal law. As to Washington state law there was no cause of action upon which petitioner could bring suit for the reason that neither petitioner nor any party whom petitioner represents had performed a condition precedent and requisite to the creation of a cause of action under the state statute, to-wit, commencing suit to recover alleged preference pay-

ments within six months from the appointment of the receiver as required by the state statute.

## III.

### Statutes Involved

This case involves the following statutes:

(1) Federal Bankruptcy Act:
§11(e), 11 U.S.C. §29(e),
§60, 11 U.S.C. §96,
§60(a)(1), 11 U.S.C. §96(b),
§60(b), 11 U.S.C. §107(b),
§70, 11 U.S.C. §110,
§70(e)(1), 11 U.S.C. §110(e)(1).

(2) Washington Preference Law:
Revised Code of Washington (R.C.W.) Chapter 23.48.

## IV.

### Statement of the Case

During the year 1951, the bankrupt, a corporate building contractor, performed construction work in the State of Washington on a building owned by Williamson and on a residence owned by Favre. Cross-Petitioners (metal fabricators) furnished labor and materials for each job at the request of the contractor and gave the five-day notice to the owners required by the Washington Mechanics Lien Law, R.C.W. §§60.04.010 *et seq.* Within the ninety-day period allowed by law for filing liens but without the liens ever having been filed, cross-petitioners received payment of their accounts. The Williamson account, in the amount of $2,424.50, was paid by check drawn by Williamson and made payable jointly to the contractor and cross-petitioners. It

was accepted by cross-petitioners after endorsement by the contractor. On the Favre account, the cross-petitioners received $730.00 by check issued directly by the contractor. Both payments took place within the four-months period next prior to the application for appointment of a state court receiver for the contractor, throughout which period the contractor was insolvent. Both payments were made on account of debts existing prior to the start of the four-months period. No credit was subsequently extended by cross-petitioners to the contractor.

After the appointment of the state court receiver, an application for involuntary bankruptcy of the contractor was made, and petitioner was subsequently appointed Trustee.

The present action was commenced by petitioner more than six months after the application for the appointment of the state court receiver but less than two years from the date of adjudication in bankruptcy. More than six months from the date of application for the receiver had not expired at the time of adjudication.

The case was heard in the District Court on cross-petitioners' Motion for Summary Judgment and was submitted to the court as a Motion for Summary Judgment joined in by petitioner. The facts were not in dispute. The District Court denied petitioner's motion and granted cross-petitioners' motion. The Court of Appeals affirmed the District Court on the Williamson account and remanded the case for trial on the Favre account.

## V.

### Reasons for Granting the Writ

The Court of Appeals erred in holding that the two-year period of limitation provided by §11(e) of the Federal Bankruptcy Act (11 U.S.C. 29(e)) was applicable.

Petitioner in considering suit to recover alleged preferential payments had a choice as to the section of the Bankruptcy Act under which he would proceed. He could proceed under §60(a)(1) and (b) of the Act,[1] which grants to the trustee a federal right to recover a preferential payment made to a favored creditor by a debtor, while insolvent and within four months prior

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[1] "11 U.S.C. §96(a) (1) and (b):

"(a) (1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

* * *

"(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however,* That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction." (July 1, 1898, c. 541, §60, 30 Stat. 562, as amended)

to the filing of the petition in bankruptcy, *provided that the trustee could show that "the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent"* (Italics supplied). Or, the petitioner could proceed under §70(e)(1) (11 U.S.C. §110(e)(1)) of the Act, which vests in the trustee a right of action to recover in federal court property which has been transferred by the bankrupt where said transfer "under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor" of the bankrupt.

The petitioner chose the second procedure and brought this action under §70(e)(1) of the Act to enforce an alleged right to recover property transferred by the bankrupt in fraud of his creditors created by the statutes of the State of Washington, *i.e.*, under R.C.W. (Revised Code of Washington) §23.48.010, §23.48.020 and §23.48.030.[2]

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[2] R.C.W. §23.48.010:

"Definitions. Words and terms used in this chapter unless the context clearly requires otherwise have the meaning set forth in this section:

"(1) 'Receiver' means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation;

"(2) 'Date of application' means the date of filing with the clerk of the court of the complaint or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, it means the date on which the receiver is designated, elected or otherwise authorized to act as such;

"(3) 'Preference' means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt

Petitioner, by choosing the state-created right of action instead of the federal right of action, secures the advantage of not being required to allege and prove that the cross-petitioners, as a so-called favored creditor, had reasonable cause to believe that the debtor was insolvent. This is a vital and important distinction between the state-created right and the federal right to recover preferential payments.

§70(e)(1) of the Act provides as follows:

> "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor."

Such right as the petitioner, as trustee, is granted under §70(e)(1) of the Act should be co-extensive with the right created by the State of Washington as defined by the highest court of that state, notwithstanding the

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than any other creditor of the same class. (1941 c. 103 §1; Rem. Supp. 1941 §5831-4)"

R.C.W. §23.48.020:

"Action to recover—Limitation. If not otherwise limited by law, actions in the courts of this state by a receiver to recover preferences may be commenced at any time within but not after six months, from the date of application for the appointment of such receiver. (1941 c. 103 §2; Rem. Supp. 1941 §5831-5)"

R.C.W. §23.48.030:

"Preference viodable when, Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by the receiver. No preferences made or suffered prior to such four months period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond the four months' period are hereby specifically superseded. (1941 c. 103 §3; Rem. Supp. §5831-6)"

fact that the Act permits the petitioner to bring his action upon the state-created right in federal court. The petitioner, as representative of the creditors, should possess only such right to avoid a transfer in fraud of creditors as a creditor could have under the "State law applicable thereto" (§70(e)(1)).

Cross-petitioners contend that the exercise of the right created by the state statute of Washington and sought to be enforced by petitioner is subject to the Washington limitation of six months from the date of application for the appointment of a receiver. *Morris v. Orcas Lime Co.*, 185 Wash. 126, 53 P.2d 604 (1936), cert. den. 299 U.S. 559, 81 L.Ed. 411 (1936).

## CONCLUSION

Petitioner has failed to present sufficient reasons for a Writ of Certiorari to be granted in this cause. The Petition and its Supporting Brief merely put forth substantially the same arguments and contentions that have already been specifically rejected by both the District Court and the Court of Appeals.

This cross-petition for Writ of Certiorari should be granted in the event that the petition for certiorari is granted.

Respectfully submitted,

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